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State v. Grabe Respondent's Brief Dckt. 44439

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. DANIEL DUANE GRABE, Defendant-Appellant.	)	NO. 44439 Ada County Case No. CR-2015-11916 RESPONDENT'S BRIEF

Issue

Has Grabe failed to establish that the district court abused its discretion by denying his Rule 35 motion for reduction of his concurrent unified sentences of 13 years, with three years fixed, imposed upon his guilty pleas to trafficking in marijuana and possession of amphetamine with intent to deliver?

Grabe Has Failed To Establish That The District Court Abused Its Sentencing Discretion

In August 2015, a U.S. Postal Inspector and Boise Police intercepted a package addressed to Grabe that contained "approximately 5.59 pounds" of marijuana. (PSI,

p.4.[1]) Officers learned that, earlier the same day, Grabe had approached a USPS letter carrier and inquired about the package "that he was anticipating to be delivered at his residence." (PSI, p.4.) After a USPS carrier delivered the package and officers observed Grabe take the package into his residence, officers served a search warrant and searched Grabe's residence. (PSI, pp.4-5.) In Grabe's bedroom, officers found a "plastic yellow container with lid containing a greenish leafy substance," numerous glass smoking devices, a drug ledger, a "bone pipe," multiple pill bottles containing amphetamine pills, two plastic bags containing Psilocybin mushrooms, 121.5 MDMA pills, a bag of foil labeled "'Acid'" that contained "10 'tabs' of an unknown substance," multiple Crown Royale bags, numerous plastic bags and heat seal bags, a "bag of pills containing empty gel caps," Zig Zag rolling papers, several firearms with ammunition, and a bag labeled "'Molly'" containing "assorted pills," a "crystal substance," and "2 baggies of powder." (PSI, pp.81, 214-15, 219-20.) In the kitchen, officers located a "food saver vacuum sealer," a "Volcano brand vaporizer," "numerous vacuum sealed bags and sandwich bags" – some of which "had green residue which appeared to be marijuana," "a small digital scale, a large digital scale, miscellaneous marijuana paraphernalia, plastic storage containers with suspected marijuana or marijuana residue, a roll of plastic for vacuum sealing items, numerous sandwich ziplock type bags, a black ashtray with white/orange powdery residue with a short blue straw (snort tube), and a lid to a jar with a ground down green organic substance and a sandwich

[1] PSI page numbers correspond with the page numbers of the electronic file "Grabe 44439 psi.pdf."

bag with 9 empty gel caps." (PSI, p.85 (parenthetical notation original).) Officers also searched Grabe's vehicles and found a jar containing "marijuana shake," a baggy containing suspected marijuana, several Crown Royale bags, a glass pipe, "a cigarette that had the odor of marijuana," a pill bottle containing 24 amphetamine pills and seven MDMA pills, and a total of $16,980 in cash and a "$20 dollar bill [that] was identified as possibly being counterfeit." (PSI, pp.84, 87-88, 93, 220.)

The state charged Grabe with trafficking in marijuana (five or more pounds, but less than 25 pounds), possession of amphetamine with intent to deliver, possession of MDMA with intent to deliver, possession of Psilocybin mushrooms, and possession of drug paraphernalia. (R., pp.72-74.) Pursuant to a plea agreement, Grabe pled guilty to a reduced charge of trafficking in marijuana (one or more pounds, but less than five pounds) and to possession of amphetamine with intent to deliver, and the state dismissed the remaining charges and agreed to recommend concurrent unified sentences of 15 years, with three years fixed. (R., pp.78, 87-89.) The district court imposed concurrent unified sentences of 13 years, with three years fixed. (R., pp.91-94.) Grabe filed a timely Rule 35 motion for reduction of his sentences, which the district court denied. (R., pp.103-05, 111-13.) Grabe filed a notice of appeal timely only from the district court's order denying his Rule 35 motion. (R., pp.114-17.)

Grabe asserts that the district court abused its discretion by denying his Rule 35 motion for reduction of his sentences because he continued to have no pending criminal cases and he wished to return to work sooner "to hasten to process of paying" his fine and restitution. (Appellant's brief, pp.4-6.) Grabe has failed to establish an abuse of discretion.

In State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007), the Idaho Supreme Court observed that a Rule 35 motion "does not function as an appeal of a sentence." The Court noted that where a sentence is within statutory limits, a Rule 35 motion is merely a request for leniency, which is reviewed for an abuse of discretion. Id. Thus, "[w]hen presenting a Rule 35 motion, the defendant must show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion." Id. Absent the presentation of new evidence, "[a]n appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence." Id. Accord State v. Adair, 145 Idaho 514, 516, 181 P.3d 440, 442 (2008).

Grabe did not appeal the judgment of conviction in this case, and he failed to provide any "new" information in support of his Rule 35 request for leniency. In his Rule 35 motion, Grabe merely pointed out that he still did not have any other criminal cases pending, reiterated that he "had several jobs before sentencing and [was] seeking to be [a] productive member of society," and stated that he continued to desire to be a productive member of society and would like "to return to full time work at an earlier date." (R., pp.103-07.) All of this information was before the district court at the time of sentencing. (PSI, pp.6-7, 11, 14, 27; Tr., p.5, Ls.4-24; p.6, L.24 – p.7, L.7.) Because Grabe presented no new evidence in support of his Rule 35 motion, he failed to demonstrate in the motion that his sentence was excessive. Having failed to make such a showing, he has failed to establish any basis for reversal of the district court's order denying his Rule 35 motion.

Even if this Court addresses the merits of Grabe's claim, Grabe has still failed to establish an abuse of discretion, for reasons more fully set forth in the district court's Order Denying Motion for Reconsideration of Sentence, which the state adopts as its argument on appeal. (Appendix A.)

Conclusion

The state respectfully requests this Court to affirm the district court's order denying Grabe's Rule 35 motion for reduction of sentence.

DATED this 9th day of March, 2017.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 9th day of March, 2017, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF ADA

THE STATE OF IDAHO, Plaintiff, vs. DANIEL DUANE GRABE, Defendant.	Case No. CR-FE-2015-11916 ORDER DENYING MOTION FOR RECONSIDERATION OF SENTENCE

Pursuant to Idaho Criminal Rule 35, Defendant Daniel Duane Grabe, through counsel, filed a motion on May 26, 2016, with supporting declaration, to request a reduction to his sentence. The State filed responsive briefing on May 31, 2016. Though Defendant requested a hearing, motions under Rule 35 may be considered and determined by the court without oral argument or admission of additional testimony. I.C.R. 35(b). This motion does not require additional testimony or oral argument, and so the motion is fully submitted to the court for determination.

PROCEDURAL HISTORY

On December 3, 2015, Defendant pled guilty to one count of Trafficking in Marijuana, a felony under Idaho Code § 37-2732B(a)(1)(A), and one count of Possession of a Controlled Substance with Intent to Deliver, a felony under Idaho Code § 37-2732(a). The Court entered a Judgment & Commitment on February 1, 2016 sentencing the Defendant to three years fixed and ten years indeterminate incarceration for the Trafficking charge, and three years fixed and ten years indeterminate incarceration for the Possession with Intent to Deliver charge. The Court ordered these sentences to run concurrently. Defendant was also order to pay restitution, fees, costs, and a fine of $5,000.

JM cc: PA, DS

Pursuant to Idaho Code § 37-2732B(a), the maximum sentence for Trafficking in Marijuana is 15 years' incarceration, and a $50,000 fine. Pursuant to Idaho Code § 37-2732(a), the maximum sentence for Possession of a Schedule II Controlled Substance with Intent to Deliver is life imprisonment and a $25,000 fine.

Defendant requests reconsideration of his sentence on three grounds. First, Defendant believes the sentence imposed for Trafficking in Marijuana and Possession of a Controlled Substance is unreasonably harsh. Second, Defendant argues the sentence imposed for the Trafficking charge far exceeds the statutory minimum of one year. Third, Defendant argues he desires to be a productive member or society, and would like to return to full time work to payoff fines more quickly. Defendant therefore requests that the sentences be reduced to 1.5 years fixed and 11.5 years indeterminate as a matter of leniency.

ANALYSIS

Idaho Criminal Rule 35(b) allows a court to reduce sentence in its discretion. *State v. Williams*, 135 Idaho 618, 21 P.3d 940 (Ct. App. 2001). The determination to grant or deny the relief requested by Defendant is a matter committed to the Court's discretion. I.C.R. 35; s*ee State v. Gardner*, 127 Idaho 156, 164, 989 P.2d 615, 623 (Ct. App. 1995). *State v. Hedgecock*, 147 Idaho 580, 586, 212 P.3d 1010, 1016 (Ct. App. 2009). The Court in *Hedgecock* held, "If a sentence is found to be reasonable at the time of pronouncement, the defendant must then show that it is excessive in view of the additional information presented with the motion for reduction." *Id.* The Idaho Court of Appeals has held that a sentence imposed by a court is not to be deemed excessive if within the statutory maximum required by law. *State v. Tisdale,* 107 481, 690 P.2d 936, 939 (Ct. App. 1984). "[A] defendant presenting a Rule 35 motion must submit new or additional information in support of the motion, and an appeal from the denial of a Rule 35 motion cannot be used as a vehicle to review the underlying sentence absent the presentation of new evidence." *State v. Shumway*, 144 Idaho 580, 583, 165 P.3d 294, 297 (Ct. App. 2007) (quotation marks omitted).

The Court has reviewed Defendant's request for a reduction of his sentence. The Court has engaged in the analysis set forth in *State v. Toohil*, 103 Idaho 565, 650 P.2d 707 (Ct. App. 1982). In *Toohil,* our Supreme Court articulated four objectives of criminal

punishment: (1) protection of society, (2) deterrence of the individual and the public generally, (3) possibility of rehabilitation, and (4) punishment or retribution for wrongdoing. Moreover, it is clear, as a matter of policy in Idaho, that the primary consideration is "the good order and protection of society." To the extent Defendant argues that the sentence was unreasonably harsh, the maximum incarceration Defendant could have suffered was life in prison. Thus, the sentence in this case was well within the maximum punishment available for the crimes committed and reasonable given the conduct and crimes at issue.

Defendant was convicted of trafficking drugs. The Defendant pled to a lesser charge and admitted mailing himself a box of marijuana from Portland. The box included nineteen heat sealed bags of marijuana that weighed at a total package weight of over five and one-half pounds of marijuana. Additionally, during the search of his residence, law enforcement found 121 pills of MDMA (ecstasy), amphetamine, bags of marijuana, weapons and ammunition. He admitted to police officers "supplementing his income" as a drug dealer. Given the severity of the crimes, the imposed sentence is reasonable, and fulfills the goal of protection of society and is reasonable punishment for wrongdoing. Although the Defendant entered a plea agreement to an amended charge of only one pound of marijuana for the amended Court I, and the mandatory minimum for which the Defendant pled was one year, given the Defendant's conduct in this offense, the minimum sentence was not warranted. The Court ultimately believes that the protection of society is best served by the sentence remaining as it is. While the Defendant's goals of paying his fines more quickly and working full time are admirable, the Court believes that altering the sentence would be unlikely to create a situation that equally fulfills the objectives of criminal punishment.

For these reasons, the Court DENIES Defendant's Motion for Reduction of Sentence pursuant to I.C.R. 35.

DATED this 18th day of July, 2016.

Lynn G. Norton, District Judge